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SHAPING THE MODERN WEST: THE ROLE OF THE EXECUTIVE BRANCH[1]

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The past months have seen much public discussion—including some ardent criticism—of President Clinton's vigorous exercise of authority to protect large tracts of federal lands in the West for conservation purposes.[2] Critics have

1. This article is a modestly edited, updated, and footnoted version of a speech I delivered on February 10, 2000 at the University of Colorado School of Law. I am greatly indebted to Mary Anne McCarthy, a paralegal in the Office of the Solicitor, for helping me track down sources. Historical information in this article has been drawn from a number of excellent histories of national policies toward federal land. These include ROY M. ROBBINS, OUR LANDED HERITAGE (2d ed. 1976) [hereinafter, OUR LANDED HERITAGE]; PAUL W. GATES, HISTORY OF PUBLIC LAND DEVELOPMENT (1968) [hereinafter HISTORY OF PUBLIC LAND]; LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN (1951); BENJAMIN H. HIBBARD, A HISTORY OF PUBLIC DOMAIN POLICIES (U.WI. ED. 1965) (1924); JOHN ISE, THE UNITED STATES FOREST POLICY (1924) [hereinafter FOREST POLICY]. These various histories discuss most of the numerous individual executive actions mentioned in this article. I have decided to avoid cluttering this article with citations to individual actions unless they are particularly relevant. A list of all Antiquities Act proclamations through 1999 can be found in *Appendix C to* VISIONS OF THE GRAND STAIRCASE-ESCALANTE: EXAMINING UTAH'S NEWEST NATIONAL MONUMENT 172–80 (Robert B. Keiter, et al. eds., 2000) [hereinafter VISIONS OF THE GRAND STAIRCASE]. A somewhat more descriptive list covering the same time period, in chronological rather than alphabetical order, and including enlargements and other boundary modifications, was prepared by the Department of the Interior and furnished to Congress as an attachment to my May 18, 1999 testimony at a hearing of the Subcommittee on National Parks and Public Lands of the House Resources Committee on H.R. 1487, a proposed amendment to the Antiquities Act, and is reproduced at http://resources committee.house.gov, Committee Published Hearings Number 106–38.

2. The national monuments proclaimed by President Clinton in the West include the Grand Staircase-Escalante, Proclamation No. 6920, 61 Fed. Reg. 50,223 (1996); Grand Canyon-Parashant, Proclamation No. 7265, 65 Fed. Reg. 2825 (2000); Agua Fria, Proclamation No. 7263, 65 Fed. Reg. 2817 (2000); California Coastal, Proclamation No, 7264, 65 Fed. Reg. 2821 (2000); Pinnacles expansion, Proclamation No. 7266, 65 Fed. Reg. 2831 (2000); Sequoia, Proclamation No. 7295, 65 Fed. Reg. 24095 (2000); Canyons of the Ancients, Proclamation No. 7317, 65 Fed. Reg. 37243 (2000); Cascade-Siskiyou, Proclamation No. 7318, 65 Fed. Reg. 37249 (2000); Hanford Reach, Proclamation No. 7319, 65 Fed. Reg. 37253 (2000); Ironwood, Proclamation No. 7320, 65 Fed. Reg. 37259 (2000); Craters of the Moon Expansion, Proclamation No. 7373, 65 Fed. Reg. 69221 (2000); Vermilion Cliffs, Proclamation No. 7374, 65 Fed. Reg. 69227 (2000).

attacked, among other things, the process leading up to the President's decisions, and the substance of his actions. I want to address here the most fundamental criticism, that the President's actions were inappropriate because these matters are for Congress to resolve.

This charge is particularly worthy of examination because President Clinton's actions have been faithful to a long tradition of executive leadership in setting aside public lands for conservation. This tradition, dating back to the earliest days of the nation, has been especially pronounced in the last hundred years or so. Its results are plain to see in the colored swatches on maps of the American West marking our most poetic and beloved natural landscapes—our great systems of national parks, forests, monuments, wildlife refuges, and other conservation areas.

My purpose here is to make the case that this tradition of strong executive leadership in preserving the awesome resources of the nation's public lands has been, to borrow Ambassador James Bryce's description of the national parks, one of the very best ideas America has had.[3] Although many of these protective steps were initially controversial, they have been rewarded with near-universal acclaim by the most demanding judge of all—history. In practically every case, the passage of time has vindicated the executive's judgment about the value to posterity of conserving large tracts of federal lands. President Clinton was surely correct when he suggested, in creating the Grand Canyon-Parashant National Monument on the Arizona Strip in January 2000, that many years in the future, few will know or care how these areas were protected, or by whom, but all will nevertheless be grateful that they were protected.[4]

THE LEGACY OF EXECUTIVE LEADERSHIP

Just west of Boulder, Colorado is the Arapaho National Forest. President Theodore Roosevelt preserved it (by setting it aside from the public domain, and thus reserving it from

3. *See* Robert W. Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906*, 20 W. Hist. Q. 281, 301 (1989).

4. Remarks Announcing the Establishment of National Monuments in Western States at the Grand Canyon, 36 WEEKLY COMP. PRES. DOC. 37, 40 (Jan. 11, 2000).

divestiture) early in the twentieth century. President Grover Cleveland preserved core areas of the neighboring Roosevelt National Forest even earlier, and President Benjamin Harrison set aside the White River and Pike National Forests as early as 1891. Indeed, chief executives set aside practically all the national forests throughout Colorado between 1891 and 1906.

Many of these executive actions were bitterly fought by local residents. One of President Cleveland's forest reserves provoked a leading Denver newspaper to publish a front page editorial thundering that it was "arbitrary," that neither the "Western People" nor any of their senators or representatives had been "consulted," that those recommending the action had "made only a cursory examination of the territory," and that the executive's action was a "menace to the interests of the Western States" because it would retard their settlement and economic growth.[5] The Denver paper's rhetoric would be much recycled over the next century.

A tour of federal lands in Colorado protected by executive initiative could include many areas besides national forests. The Colorado National Monument was reserved by President Taft in 1911, and later expanded by Presidents Hoover and Eisenhower; Dinosaur National Monument was reserved by President Wilson in 1915 and expanded by President Franklin Roosevelt in 1938; Hovenweep National Monument was reserved by President Warren Harding and enlarged by Presidents Truman and Eisenhower; and Canyons of the Ancients National Monument was reserved in 2000 by President Clinton.

We could also stop at the nation's two newest national parks, Black Canyon of the Gunnison and Great Sand Dunes. While these areas were designated as parks by Congress within recent months,[6] both were first preserved by President Hoover as national monuments; the former shortly before he left office in 1933, and the latter a year earlier.

Or we could stop at the Arapaho or Browns Park National Wildlife Refuges. A significant portion of each was first

5. *See* OUR LANDED HERITAGE, *supra* note 1, at 315.

6. *See* Pub. L. No. 106-076, 113 Stat. 1126 (1999) (Black Canyon of the Gunnison); and Pub. L. No. 106-530, 114 Stat. 2527 (2000) (Great Sand Dunes). The later legislation authorized the Secretary of the Interior to proclaim a national park upon certain findings being made.

safeguarded for wildlife by executive action—in this case by order of the Secretary of the Interior.

These Colorado examples are typical. Throughout the West, conservation-oriented protected areas have been fashioned largely by executive action. Most of the national forests, and nearly all the ones in the West, were originally protected by presidential proclamations. When Teddy Roosevelt took office shortly after the dawn of the twentieth century, his immediate predecessors had set aside fifty million acres of federal land as forest reserves; by the time TR left office, well over 150 million acres were in the national forest system.

Much of the land in our 521 national wildlife refuges was set aside or reserved by the executive (either the President or the Secretary of the Interior) in the twentieth century.[7] Teddy Roosevelt, the father of the national wildlife refuge system, reserved Pelican Island in Florida as a wildlife sanctuary in 1903 and, before he left office, designated fifty-two more. The refuges in the eleven Western states (excluding Alaska) include a little more than seven million acres of federal land; about five million of those acres were set aside by presidential or secretarial order.

Turning to national monuments,[8] Teddy Roosevelt again set the pace by creating eighteen in about three years. President Carter holds the acreage record by setting aside fifty-six million acres of monuments in Alaska.

Bold executive action has also led to the preservation of spectacular Bureau of Land Management lands—witness President Clinton's creation of national monuments managed by BLM at Grand Staircase-Escalante (Utah), Grand Canyon-Parashant (Arizona), Agua Fria (Arizona), Cascade-Siskiyou (Oregon), Canyon of the Ancients (Colorado), Ironwood (Arizona), and Vermilion Cliffs (Arizona). Less obvious, but very important, were sweeping executive withdrawals in the

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7. A brief history of the origin and evolution the national wildlife refuge system can be found in MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 283–84 (3d. ed. 1997); NATHANIEL P. REED & DENNIS DRABELLE, THE UNITED STATES FISH AND WILDLIFE SERVICE 6–10, 19–24 (1984). A list and description of refuges can be found at http://refuges.fws.gov.

8. Useful histories of the Antiquities Act include Ronald Freeman Lee, *The Antiquities Act of 1906*, 42 J. OF THE SOUTHWEST 247 (2000); HAL ROTHMAN, PRESERVING DIFFERENT PASTS: THE AMERICAN NATIONAL MONUMENTS (1989).

late nineteenth and early twentieth centuries, which put many millions of acres of federal lands off-limits to mineral and hydropower development. These withdrawals led directly to the enactment in 1920, after titanic battles in Congress, of the Mineral Leasing Act[9] and the Federal Power Act.[10] In both, Congress gave the executive the ability to control—including the all-important right to proscribe—future fossil fuel and hydropower developments on federal lands.

Equally significant were President Franklin D. Roosevelt's mid-1930s withdrawals, which essentially closed the public domain.[11] The Taylor Grazing Act of 1934 had left the public lands open to continued divestiture under a variety of laws,[12] but FDR promptly issued orders keeping most of them in public ownership. Many more millions of acres of federal land have been withdrawn by the executive from particular uses, especially mining, throughout the twentieth century.[13]

This brief survey leaves no doubt that the story of preserving magnificent features of America's federal lands has predominantly been one of leadership by the executive, not by Congress. Without these bold executive actions, the federal lands would probably be much diminished in both size and quality today.

THE BIPARTISAN CHARACTER OF EXECUTIVE ACTION

The record of the last quarter of a century—dating roughly from the Carter presidency—suggests that executive leadership on conservation has been a partisan issue; that it's not just bold leaders, but bold Democratic leaders, who are responsible, with the Republicans left waffling between grudging acquiescence and outright opposition. Presidents Nixon, Reagan, and Bush were, for example, the only Presidents in the twentieth century not to designate any national monuments.

With a longer view, however, all traces of partisan character disappear. Republican Teddy Roosevelt is in a class

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9. 30 U.S.C.A. § 181 (West 2000).

10. 16 U.S.C.A. § 792 (West 2000).

11. *See* CLOSING OF THE PUBLIC DOMAIN at 221–24; *see also* Andrus v. Utah, 446 U.S. 500, 520 (1980).

12. *See* 43 U.S.C.A. § 315 (West 2000).

13. *See* GEORGE CAMERON COGGINS, ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 290–92 (4th ed. 2000) [hereinafter FEDERAL PUBLIC LAND AND RESOURCE LAW].

by himself in wielding executive authority to reserve federal lands, but Republicans Benjamin Harrison and William McKinley were also active. Indeed, except for a few million acres of forest reserves proclaimed by Grover Cleveland, all of the reservations that form the backbone of the modern national forest system were the result of action by Republican Presidents. Later Republican stalwarts like William Howard Taft, Warren Harding, and Calvin Coolidge likewise unhesitatingly wielded the presidential pen to reserve federal land for conservation purposes. And consider the national monuments Republican Herbert Hoover set aside as a lame duck after he lost the 1932 election to FDR: a large addition at the Grand Canyon, White Sands (New Mexico), Death Valley (California), Saguaro (Arizona), and Black Canyon of the Gunnison (Colorado). Citizens of the nation's capital are eternally grateful for Republican Dwight Eisenhower's action in designating the C&O Canal as a national monument just two days before JFK was inaugurated. Incidentally, Democrats in Congress—notably Colorado's Wayne Aspinall—were so infuriated that for several years thereafter, they blocked Congress from appropriating money for its management.

In most of the cases mentioned, the executive was of the same party as the one controlling both Houses of Congress. Teddy Roosevelt and the other Republican Presidents of his era were dealing with Republican-controlled Congresses. Wilson, FDR, LBJ and Carter each set aside large amounts of federal land when Congress was controlled by Democrats.

CASES OF CONGRESSIONAL LEADERSHIP

To be fair, Congress must be given its due. It occasionally has taken the lead in public land conservation designations. Indeed, the world's first national park, Yellowstone, came about because Congress—with some help from the executive, but more from outside interests—was persuaded to set it aside.[14] That stunning victory for conservation likely contributed to a vague public sense that gives Congress most of

14. The story of the designation of Yellowstone, in which Thomas Moran's artistry, William Henry Jackson's photographs, Ferdinand Hayden's government survey, and Jay Cooke's Northern Pacific Railroad all played prominent roles, has been told in many places. *See, e.g.*, PAUL SCHULLERY, SEARCHING FOR YELLOWSTONE 50–67 (1997); 1 AUBREY L. HAINES, THE YELLOWSTONE STORY, 156–73 (revised ed. 1996).

the credit for protecting the crown jewels of federal lands. But instances like Yellowstone have been relatively rare; when Congress has acted, it has mostly done so in the wake of executive action.

For example, although Congress has never given the executive the power to designate a national park, the fact is that many of the crown jewel parks (such as Grand Canyon, Zion, Capitol Reef, Bryce Canyon, Grand Teton, Acadia, Carlsbad Caverns, Olympic, Death Valley, Glacier Bay, and now Black Canyon and Great Sand Dunes) were first set aside—and often later expanded—by Presidents acting under the Antiquities Act. Only some years later did Congress lay park designations on these areas.

Congress has also maintained exclusive authority to designate national conservation areas, national recreation areas, additions to the National Wilderness Preservation System, and (with a limited exception) river segments in the National Wild and Scenic Rivers System.[15] Finally, even though most national monuments have been designated by Presidents under the Antiquities Act, Congress has also occasionally legislated national monuments; e.g., at Mount St. Helens.[16]

Sometimes Congress has acted mainly in response to executive interest in taking unilateral action to the same end. In the last several months, Secretary of the Interior Babbitt publicly displayed keen interest in recommending that the President establish national monuments at Steens Mountain in Oregon, in the Las Cienegas area near Tucson, in the Santa Rosa Mountains near Palm Springs in the California Desert, and in the Black Rock Desert north of Reno, Nevada, and that he expand the Great Sand Dunes and Colorado National Monuments in Colorado. Secretary Babbitt invited Congress to make such recommendations unnecessary by legislating comparable protection, and Congress accepted the invitation in the fall of 2000.[17] Although Congress may be credited with this

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15. *See, e.g.*, FEDERAL PUBLIC LAND AND RESOURCES LAW, *supra* note 13, at 1036–43, 1117–21, 1148–1220.

16. *See* Mount St. Helens National Volcanic Monument Act of 1982, Pub. L. No. 97-243, 96 Stat. 301 (1982).

17. *See* Pub. L. No. 106-399, 114 Stat. 1655 (2000) (Steens Mountain); Pub. L. No.106-351, 114 Stat. 1362 (2000) (Santa Rosa Mountains National Conservation Area); Pub. L. No. 106-353, 114 Stat. 1374 (2000) (Colorado Canyons National Monument expansion); Pub. L. No. 106-530, 114 Stat. 2527 (2000) (Great

step, the executive's ability and manifest willingness to invoke the Antiquities Act to the same end was instrumental in achieving this result.

The pattern is clear. Whether the executive and legislative branches have been under Republican or Democratic control, it has been the executive and not the Congress that has most often led in conserving large tracts of public lands. But can we describe this executive leadership as successful? How should success or failure be determined?

EXECUTIVE ACTION TESTED IN THE COURTS

One measurement is to examine how the executive's actions have held up in the courts. Here the results are clear-cut. Although the sources of executive authority range from the definitively expressed to the subtly implied, practically every time the courts have been asked to pass on such executive decisions, the executive has prevailed.

Sometimes the courts have not even been called upon to examine bold executive actions. Consider, for example, the use of what Charles Wilkinson has called a "little-noticed, seemingly innocuous" single sentence[18] in an 1891 law innocently titled the General Revision Act. It authorized the President to "set apart and reserve . . . any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not," as public reservations.[19] Some members of Congress in 1891 may have harbored misgivings about the potential breadth of this power they were sending down Pennsylvania Avenue to the chief executive. But I doubt a single one of them would have forecast that, in less than two decades, a few strokes of the presidential pen would invoke it to create the modern national forest system, the envy of the world. Yet the courts were never asked to intervene.

Sand Dunes National Park); Pub. L. No. 106-538, 114 Stat. 2563 (2000) (Las Cienegas National Conservation Area); Pub. L. No. 106-554, 114 Stat. 2763 (2000) (Black Rock Desert and Emigrant Trails National Conservation Area).

18. CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN 122 (1992).

19. General Revision Act of 1891, Act of March 3, 1891, 26 Stat. 1095, 1103 (known as the Forest Reserve Act of 1891), *repealed by* Federal Land Policy and Management Act of 1976, Title VII, § 704(a), 90 Stat. 2792 (1976). *See also* OUR LANDED HERITAGE, *supra* note 1, at 304.

The courts have examined presidential use of the Antiquities Act, which authorizes Presidents to reserve federal lands as national monuments to protect "objects of historic or scientific interest."[20] By the time Congress enacted this law in 1906, it already knew what chief executives had done with the modestly expressed authority in the 1891 General Revision Act, so it took some care to confine reserves to the "smallest area compatible with the proper care and management of the objects to be protected."[21] Yet this has not stopped nearly every President since 1906 from using this law to set aside many millions of acres of federal land to protect capaciously defined objects of historic interest.

In the leading court case on presidential use of the Antiquities Act, an Arizona county sheriff (and later U.S. Senator) named Ralph Cameron challenged Teddy Roosevelt's use of the Antiquities Act to preserve the Grand Canyon. In its 1920 decision in *Cameron v. United States*, a unanimous Supreme Court rejected claims that the Canyon was not an object of historic or scientific interest and that the land reserved was not the smallest area compatible with its proper care and management. The Court's opinion noted tersely that it is

> [T]he greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its border thousands of visitors.[22]

Lower courts have followed this lead in rebuffing challenges to other monuments.[23]

Sometimes the executive has simply seized the initiative without pointing to any statutory authority. This was the case

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20. *See* 16 U.S.C. §§ 431–433 (1994).

21. *See* 16 U.S.C. § 431; Robert W. Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906*, 20 W. HIST. Q. 281, 284 (1989).

22. *See* Cameron v. United States, 252 U.S. 450, 456 (1920).

23. *See* Anaconda Copper Co. v. Andrus, 14 Env't Rep. (BNA) 1853 (D. Alaska 1980); State of Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945); *cf.* State of Alaska v. Carter, 462 F. Supp. 1155 (D. Alaska 1978) (NEPA). *But see* Utah Ass'n of Counties v. Clinton, No. 2:97 CV 479, 2:97 CV 492, 2:97 CV 863, 1999 U.S. Dist. LEXIS 15852, *1 (D. Utah Aug. 11, 1999).

with the creation of many of the early bird reserves that formed the backbone of the national wildlife refuge system, and with executive withdrawals of federal land from various laws that would have opened these lands to exploitation. Here too, the courts have generally endorsed executive action.

The Supreme Court has long spoken favorably of the President's right, without *any* express authority from Congress, to take steps to preserve federal lands from private exploitation. In 1867, for example, it acknowledged that, from early in our nation's history, "it has been the practice of the President to order from time to time, as the exigencies of the public service required, [federal lands to be] set apart for public uses."[24] The most pointed example of Supreme Court deference to executive branch leadership in natural resource conservation came five years before *Cameron*, in the famous *Midwest Oil*[25] decision. By a stroke of the pen, President Taft had put many millions of acres of federal land off-limits to the application of mining laws that gave industry free rein (including the opportunity to gain title to public land). The Court upheld Taft, persuaded that the nation's chief executive "was in a position to know when the public interest required particular portions of the people's lands to be [set aside]."[26] Such actions, being subject to valid existing rights, "inflicted no wrong upon any private citizen,"[27] and being subject to congressional reversal, "could occasion no harm to the interest of the public at large."[28] *Cameron* and *Midwest Oil* could not be clearer: Executive leadership has been given the imprimatur of the courts.

CONGRESSIONAL RESPONSE TO EXECUTIVE LEADERSHIP

A second way to judge success or failure is by measuring Congress's response to these bold executive actions. The Supreme Court's *Midwest Oil* decision summarized the historical record up to 1915 this way: From the early days of the Republic, Presidents had reserved federal land by executive order at least 252 separate times for what the Court called,

24. Grisar v. McDowell, 73 U.S. (6 Wall.) 363, 381 (1867).
25. United States v. Midwest Oil Co., 236 U.S. 459, 469, 471 (1915).
26. *Id.* at 471.
27. *Id.*
28. *Id.*

somewhat euphemistically, "useful, though nonstatutory, purposes."[29] Not only had Congress failed to repudiate these executive reservations, according to the Court, but it had instead "uniformly and repeatedly acquiesced in the practice."[30] Five years after the Court upheld Taft's withdrawals of federal land from oil and gas development, Congress threw in the towel by enacting the Mineral Leasing Act. Its key features ratified the executive's authority to deny mining companies free access to federal land for most forms of mineral development, and kept these lands in federal ownership.[31]

Congressional reaction to chief executives' use of the Antiquities Act paints a picture almost as clear. Very few monuments have been undone by Congress. The handful of exceptions have involved very small areas of little national significance that were either turned over to state or local governments (e.g., a cross dedicated by a French Jesuit priest in 1688 on what is now a military reservation in New York, and Verendrye Butte, a promontory in North Dakota that marked the crossing of the Missouri River by an early exploration party) or put back into ordinary national forest status (e.g., the Holy Cross, a mountain face in Colorado which captures snow in the form of a Greek cross).

It is almost unheard of for Congress to place any limits on the executive's power to act to conserve federal lands. The few exceptions merit brief discussion. Since 1950, for example, chief executives have been barred from using the Antiquities Act in the state of Wyoming.[32] This was the product of congressional pique over Franklin Roosevelt's 1943 creation of the Jackson Hole National Monument at the base of the Grand Tetons. (An overwrought Wyoming Senator compared FDR's action to the then-recent bombing of Pearl Harbor.) Congress presumably did not act out of a belief that there were no more objects of historic or scientific interest in Wyoming worthy of presidential attention, yet the ban remains on the statute books even though some leading Wyoming political figures, such as former Senator and elder statesman Cliff Hansen (who, as a young Teton County commissioner, strongly opposed the

29. *See id.*
30. *Id.*
31. *See* U.S. *ex. rel.* McLennan v. Wilbur, 283 U.S. 414 (1931).
32. *See* 16 U.S.C.A. § 431(a) (West 2000).

creation of the Jackson Hole National Monument in 1943), now acknowledge the wisdom of FDR's action.

Another in the short list of exceptions to total congressional acquiescence was Congress's partial repeal (effective in six Western states) of the 1891 statute authorizing the President to create forest reserves. This was done through a rider on an appropriation bill in 1907.[33] Although this ended the chief executive's power to create new national forests in these states, the irrepressible TR removed much of its sting when, in the days immediately before he signed the appropriation bill, he proclaimed twenty-one new forest reserves in those very states.

Congress has also sometimes acted not to repeal executive authority, but to channel its exercise through certain processes. The leading example here is the withdrawal provisions of the Federal Land Policy and Management Act of 1976 (FLPMA).[34] At first blush, that statute seemed to challenge executive power head-on, because it sought to repeal the chief executive's implied withdrawal authority approved by the Supreme Court in *Midwest Oil*.[35] Furthermore, it ordered the executive to provide public notice, analysis, and reports before making most large withdrawals, and also required that such withdrawals be periodically reexamined.[36] These features should not, however, obscure the fact that FLPMA—which was the product of a broad bipartisan coalition in the Congress, including most members from the West—actually enlarged rather than restricted the scope of the executive's statutory power to withdraw and reserve federal lands. It did so by repealing an earlier statute that forbade the executive from withdrawing federal land from metalliferous mineral development. Moreover, Congress took care in FLPMA not to revoke any existing withdrawals, and to protect the President's authority under the Antiquities Act.[37] All told, then, FLPMA is more of a congressional endorsement than a congressional repudiation of executive withdrawal authority.

Other than these examples, the legislative response to bold executive actions has tended to follow a predictable course.

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33. *See* OUR LANDED HERITAGE, *supra* note 1, at 349.
34. *See* 43 U.S.C.A. §§ 1701–1784 (West 2000).
35. *See* FEDERAL PUBLIC LAND AND RESOURCE LAW, *supra* note 13, at 292.
36. *See id.* at 292–93.
37. *See* 43 U.S.C.A. § 1714(j) (West 2000).

Congress has generally not interfered with executive leadership. It has not only left intact practically all of the hundreds of executive branch actions that have colored in the map of the West, but ultimately, it has come to ratify these actions and embrace these areas as its own. I've already described how presidentially created national monuments form the nucleus of many national parks. To take another example, in the Alaska National Interest Lands Conservation Act of 1980 (ANILCA),[38] Congress ratified and endorsed, with some minor adjustments, the fifty-six million acres of reservations Jimmy Carter had set aside under the Antiquities Act. Even at Jackson Hole, where Congress had countered the executive by preventing the Act from being used again in Wyoming, it took only a few more years for Congress to add some of the monument lands to the national park, and the remainder to the National Elk Refuge and the Teton National Forest.

CULTURAL ACCEPTANCE OF THE FRUITS OF EXECUTIVE LEADERSHIP

A third, and perhaps the ultimate, way to judge success or failure of executive leadership is by measuring cultural acceptance. To what extent have these executive land reservations been woven into the local, regional, and national fabric? Here too, the answer seems clear: They have stood the test of time. Today only the most committed libertarian would say that the nation made a mistake in creating these great national conservation reserves on federal lands.

The hindsight of history suggests that a Seattle paper got it seriously wrong in early 1907 when it railed against some of Teddy Roosevelt's forest reserves, claiming he was hampering development in the state in order "to please a few dilettante experimentalists, however well intentioned and patriotic in purpose they may be."[39] The newspaper exuded confidence that this effort to keep the "greater part of this state . . . in a primeval wilderness for the benefit of wealthy lumbermen and city sportsmen does not appeal to the people of Washington."[40] To the contrary, most people love these conservation reserves and want continued protection for them. They want them

38. *See* 16 U.S.C.A. §§ 3101–3233 (West 2000).
39. OUR LANDED HERITAGE, *supra* note 1, at 350–51.
40. *Id.*

preserved and enhanced; they don't want to see them mined or logged or otherwise developed.

Given the strong feelings Americans have about land, government, and government lands, it is scarcely surprising that executive actions to conserve federal lands have sometimes provoked controversy. Like breaking eggs to make an omelet, however, an element of controversy may illustrate the value of executive leadership. President Clinton's designation of the nearly two million acre Grand Staircase-Escalante National Monument on federal land in southern Utah in 1996 came at the end of long public debate over future federal land use in the region, marked by congressional gridlock. Almost two decades of debate preceded FDR's action at Grand Teton, and congressional impasse led directly to President Eisenhower's designation of the C&O Canal and President Carter's designation of the Alaska monuments in the 1970s. Where the debate has been joined, the various alternatives aired, and legislative action thwarted, we have been fortunate that Presidents have had the legal, as well as the moral, authority to step in and cut the Gordian knot. Often the executive action is greeted with relief in many quarters as the stalemate is broken.

The response to executive action tends to follow a pattern. First are complaints about interference with congressional prerogatives, often repeated by opponents of changing the status quo. Experience shows these complaints usually fade rather quickly, giving way to acceptance (albeit sometimes grudging in the vicinity of the federal lands affected) of the course for the future set by executive leadership. Eventually comes congressional ratification, endorsement, and even enhancement of the executive action.

Although the controversy over President Clinton's September 18, 1996 creation of the Grand Staircase-Escalante National Monument was intense, consider what Congress managed to do within three short years of its creation: Rather than undoing it, Congress has funded its management (including preparation of a management plan by the executive that has found general acceptance), approved the acquisition by the BLM of all 180,000 acres of state lands found within the monument's boundaries (in exchange for BLM land elsewhere), approved and funded the reacquisition of federal coal leases in

the monument, and made only minor adjustments in its boundaries.[41]

Overall, then, a powerful case can be made for the proposition that executive leadership in federal land conservation has been one of the great success stories of American government. These executive decisions now seem astoundingly prescient. They have left a public hungry for open spaces and associated amenities with an enormous beneficence in the West that the other regions of the country, with fewer publicly owned lands, cannot match. As we embark on the twenty-first century, with the West still the fastest growing region in the country, the value of that legacy is clearer than ever.

EXECUTIVE LEADERSHIP: HOW REAL IS THE POSSIBILITY OF ABUSE?

What about the charge that vigorous executive leadership to protect federal land for conservation purposes is dangerously subject to abuse? This is a legitimate concern, but the record to date is decidedly comforting. Consider what the map of the West would look like, and what the quality of life in the West would be like, without such bold executive actions. Would we have the national forests and parks and refuges and monuments and other protected areas we treasure today?

The answer is almost certainly no. If the executive had waited for the Congress to act, the wait would likely have been long. Part of the problem is the nature of the congressional process in making decisions about how particular tracts of federal lands are to be managed. These management choices usually bring to the fore a pronounced tension between local and national interests. Congressional decisionmaking usually favors the former. It was, after all, a prominent leader of Congress, Tip O'Neill, who said, "all politics is local."[42] Congressional representatives are accorded a near-veto power over legislative proposals directly aimed at their districts. To this must be added the enormous inertia against any

41. *See* Pub. L. No. 105-335, 112 Stat. 3139 (1998) (state land exchange ratification); Pub. L. No. 106-113, § 601, 113 Stat. 1501 (1999) (FY 2000 appropriation act approving funds for coal lease acquisition); and Pub. L. No. 105-355, § 201, 112 Stat. 3247 (1998) (minor boundary changes).

42. TIP O'NEILL & GARY HUMEL, ALL POLITICS IS LOCAL (1999).

legislative action at all—given the filibuster and other Daedalian tactics, it is always far easier to stop legislation than to enact it. All told, the legislative process is designed less to lead change than it is to slow it down and ameliorate its effects.

It is very difficult for "national interest" arguments to overcome these obstacles and lead to legislation that would conserve particular local areas, especially in the face of a local public opinion that is indifferent, skeptical, or downright hostile to such steps. It is no accident, for example, that Congress acted to make Yellowstone a national park while Wyoming was still a territory, before it had voting representation in Congress.

That institutional dynamic also helps explain the bipartisan character of presidential activism in this area. The President—the only public official elected by all the people in the country—has more freedom to take a longer and broader view, to be more guided by a sense of how the proposal would be regarded in the future by all the people in the country. And it helps explain why a number of these bold executive actions have come at the end of a President's tenure in office, when a President is more guided by a regard for posterity. Teddy Roosevelt created the Olympic National Monument (now Olympic National Park) just hours before he left office. Lyndon Johnson set aside Marble Canyon—now part of Grand Canyon National Park—and expanded two other National Monuments on the last day of his administration, and I've already referred to President Hoover's remarkable actions as a lame duck.

THE WEST WITHOUT A TRADITION OF BOLD EXECUTIVE ACTION

In imagining how the West might look today without a tradition of bold executive leadership, consider Sedona, Arizona. Despite its spectacular scenery, executive leadership to conserve it was not forthcoming and, predictably, Congress could never muster support for protective action. Today, restoration of a landscape-level, park-like experience to this highly privatized and developed area would be prohibitively expensive.

Or consider some other areas with spectacular natural values that met a similar fate, but where the will was or is being found to spend the public money necessary to put some of these lands back into protective public ownership. There's the

Lake Tahoe basin, on the Nevada-California border, celebrated as an unspoiled remote wilderness by Mark Twain as recently as the 1870s in *Roughing It,*[43] but where substantial amounts of land were privatized before public opinion evolved in favor of protection. Now an enormous effort is underway, and large sums of public money are being expended, to preserve the beauty of that region so threatened with overdevelopment and pollution.[44] And there's Redwood National Park in northern California, bought back into public ownership at a cost of several hundred million dollars in the 1960s and 1970s.[45] Assembling the information to make the calculation would be difficult, but the price tag for this single park may well have exceeded the out-of-pocket acquisition cost (from foreign governments and private owners) of all the entire remaining acreage in the national park system.

Or, to take more recent examples, there's the Headwaters Redwood Forest in California and the New World Mine site on the border of Yellowstone. Each involved substantial outlays of public money (some five hundred million and sixty-five million dollars, respectively) to overcome the legacy of past failures to take bold protective actions before private rights vested.[46]

CONGRESSIONAL CHECKS ON THE EXECUTIVE

A second response to concerns about abuse of executive power—and to the concomitant concern that executive action is less democratic than legislative action—is to consider the ways executive mistakes can be corrected. Most obviously, Congress could reverse outright, by simple legislation, any of the executive actions described in this article. Short of that, Congress could revise or modify them, or prohibit similar actions in the future (as with the Antiquities Act amendment in Wyoming). Or Congress could exercise its power over the purse to control the conservation area's management (which was Congress's angry, short-term response to President

43. *See* MARK TWAIN, ROUGHING IT (Oxford Univ. Press 1996) (1872).

44. *See* Lake Tahoe Restoration Act, Pub. L. No. 106-506, 114 Stat. 2351 (2000) (authorizing up to $300 million to pay for environmental restoration efforts in the basin).

45. *See* FEDERAL PUBLIC LAND AND RESOURCES LAW, *supra* note 13, at 1100–13.

46. *See* Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 105-83, §§ 501–504, 111 Stat. 1543, 1610–1617 (1998).

Eisenhower's establishment of the C&O Canal National Monument in the Washington, D.C. area). Congress has, in other words, many tools to ensure that executive abuses will not stand.

The historical record is remarkably free from such congressional actions. To the contrary, once the executive has taken a bold step, Congress has tended to respond by doing what it does best, managing and shaping change at the margins, but not thwarting it. Even at the C&O Canal, it wasn't long before Congress recognized its value and converted it into a fully funded national historical park, and it is now a heavily used open space and recreational treasure. Congress's record of overwhelming acquiescence in, and ultimate support for, executive conservation actions speaks loudly that the executive has not abused its power.

ADVANTAGES OF EXECUTIVE PROTECTIVE ACTIONS

There is another reason to welcome rather than fear executive branch leadership. Although the existence of an immediate threat is not a necessary precondition to protective action, where threats do exist, the executive is almost always able to act more quickly than the Congress. Congressionally legislated land protection usually has a very long gestation period. Proposals to set aside some lands now protected in the Grand Staircase-Escalante National Monument date back to the 1930s. Congress set in motion a process to review and consider wilderness designations for BLM land almost a quarter of a century ago;[47] today, only a small fraction of the areas studied have been addressed by Congress in legislation.

Executive action can be much more prompt, though speed may be accompanied by controversy. While executive withdrawals of federal land from mineral entry have drawn protests from the mining industry throughout history,[48] they may be the only effective way to keep new mining claims—and new property rights—from being created and complicating protection. Many examples in the history of public land protection demonstrate the value of acting boldly, and the pitfalls of failing to do so.

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47. *See* FEDERAL PUBLIC LAND AND RESOURCES LAW, *supra* note 13, at 1198–1220.

48. *See id.* at 287–307.

This underscores a crucial point: The kind of executive action addressed in this article is preservative. By definition it does not create private rights—indeed, just the opposite. It forestalls the creation of new private rights in public property, even while it respects private rights that have already been created. (Admittedly, it can frustrate expectations that have not ripened into property rights, which helps account for the controversy that sometimes accompanies the action.)

This kind of protective executive action should be contrasted with its opposite number—bold executive action that creates private rights (or, put another way, that transfers publicly-owned resources into private hands). When the executive leases oil and gas on federal lands, for example, it creates property rights that make reversing the action (whether by the executive or the Congress) much more difficult, especially without compensation. Consider, for example, the actions of Secretary of the Interior James Watt in the early 1980s to open up vast areas of the outer continental shelf to oil and gas leasing.[49] A bold executive action indeed, but one which, almost from the moment it was taken, was widely regarded as a serious mistake that ought to be reversed. The United States has been litigating and buying its way out of that improvident action ever since.[50] This is in sharp contrast to protective executive actions, which could, if necessary, be reversed or limited in effect without serious cost to the United States Treasury.

EXECUTIVE ACTION AND PROCESS

I will close with a few words about the process by which these executive actions are taken. Opponents of President Clinton's uses of executive authority to conserve federal lands have focused not nearly so much on what he has done as on how he has done it. The most vehemently asserted criticism is that the President acted precipitously, without adequately consulting the public and public officials.

This criticism was leveled especially at the process leading to the Grand Staircase-Escalante proclamation. But these

49. *See id.* at 599.

50. *See generally* Marathon Oil Co. v. United States, 120 S. Ct. 494 (2000); John D. Leshy, *Public Lands at the Millennium*, 46 PROC. OF THE ROCKY MT. MIN. L. INST. 1-1, 1-36, 1-37 (2000).

facts are worth considering: Twenty years of intense public debate over the future management of Grand Staircase-Escalante had thoroughly explored the relevant issues, even if it had not been enough to break congressional gridlock. Furthermore, in the days leading up to the President's decision, an intense consultation was conducted with interested public officials in Utah. Every single concern expressed by these officials—including whether the Park Service or the BLM would manage the monument, and what would happen to hunting, fishing, livestock grazing, and water rights—was addressed in the proclamation, in a way that was generally in accord with the views expressed by the Utah interests.[51] Indeed, the Grand Staircase-Escalante proclamation contained an attention to management details that was unprecedented in the history of the Antiquities Act.

When President Clinton later asked Secretary Babbitt for any additional national monument recommendations he may have, the Secretary sought to eliminate the process argument altogether by making strenuous efforts to consult local and regional interests well before submitting new recommendations. He began publicly identifying areas that might warrant further protection, went on the road to meet with local and regional interests, and invited the pertinent congressional delegations to develop comparably protective legislation to substitute for executive action. At Grand Canyon-Parashant, for example, he announced his interest in seeing the area protected more than a year in advance, and made several well-publicized trips to the area to meet with local interests. He testified about the area before Congress, and his representatives spent months meeting with interested individuals and working with members of Congress to design protective legislation. The legislative effort went nowhere. The local congressman did introduce a bill to make the area a national conservation area, but its details were counterfeit; remarkably, it would have weakened conservation protections in existing law.[52] When it became clear that the delegation was

51. *See Bills to Amend the Antiquities Act: Hearings on H.R. 1127, S. 62, and S. 477 Before the Senate Comm. on Energy and Natural Res.*, 105th Cong. (1998) (statement of John Leshy, Solicitor, United States Department of the Interior), 1999 WL 61440.

52. *See* Shivwits Plateau National Conservation Area Establishment Act, H.R. 2795, 106th Cong. (1999). The Administration detailed its objections in testimony before the House Resources subcommittee on the bill. *See Shivwits*

not serious about moving protective legislation, Secretary Babbitt forwarded his recommendation for national monument designation to the White House, which publicly announced its receipt. It was only after an additional month of public discussion that President Clinton acted.[53]

All this advance public discussion left no doubt that the President's action had overwhelming public support. A poll commissioned by environmental groups of a random sample of several hundred Arizona voters taken between the public announcement of the Secretary's recommendation and the President's proclamation showed that about three-quarters of those polled supported the idea.[54] Responses were similar among Republicans, Democrats, urban, suburban, and rural residents. The poll showed similar support for the Agua Fria National Monument, an archeologically-rich area of BLM land forty miles north of Phoenix which lacks the iconic status of the Grand Canyon, but which President Clinton protected at the same time.

NEW DEVELOPMENTS IN THE EXECUTIVE-LEGISLATIVE DIALOGUE

Some members of the 106th Congress have continued efforts to limit or encumber the Antiquities Act, seeming to pervert the old Washington maxim "if it ain't broke, don't fix it" into "if it ain't broke, break it." Secretary Babbitt testified in opposition that it would be silly to change a single comma in a law that has had such a remarkable track record of success.[55]

On the other hand, there have been recent signs of a more positive and constructive turn in the congressional-executive relationship on conservation of federal lands. Most significantly, Congress has occasionally accepted Secretary Babbitt's invitation to work together to craft comparably

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Plateau and Utah Wilderness: Hearing on H.R. 2795 Before House Subcomm. On Nat'l Parks and Pub. Lands, 106th Cong. (1999) (statement of Bruce Babbitt, United States Secretary of the Interior), 1999 WL 969928.

53. Proclamation No. 7265, 65 Fed. Reg. 2825 (Jan. 11, 2000) (proclaiming establishment of the Grand Canyon-Parashant National Monument).

54. *See* BEHAVIOR SCI. RES. CTR., SURVEY OF ARIZ. VOTERS ON NAT'L MONUMENT DESIGNATIONS (2000).

55. *See Withdrawal of Lands from Public Lands: Joint Oversight Hearing Before House Comm. on Res.*, 106th Cong. (1999) (statement of Bruce Babbitt, United States Secretary of the Interior), 1999 WL 179143.

protective legislation as a substitute for unilateral executive action. A bipartisan effort involving all members of the Oregon congressional delegation and the State's Governor, working with the Secretary, have succeeded in enacting into law a comprehensive protection measure for the Steens Mountain area in the southeastern part of the state. Importantly, this bill did some things, such as designate new wilderness areas, that the executive could not have done unilaterally.[56]

Similar success has come through the efforts of Congressman Scott McGinnis in Colorado, working with the Secretary and the rest of the Colorado congressional delegation, at Colorado Canyons near Grand Junction, and at Great Sand Dunes.[57] These successes offset the delegation's failure to craft acceptable legislation as a substitute for the President's designation of the Canyons of the Ancients National Monument in southwestern Colorado. Congresswoman Mary Bono of California, working with the Secretary and the other members of the California delegation, secured enactment of legislation creating the Santa Rosa National Conservation Area in the back yard of Palm Springs.[58] And Congressman Jim Kolbe of Arizona achieved similar success with designation of the Las Cienegas National Conservation Area on 42,000 acres of federal land southeast of Tucson,[59] offsetting the failure to achieve legislation at the Grand Canyon-Parashant. Interestingly, all three members of Congress mentioned are Republicans. Senator Richard Bryan led an effort to create a national conservation area in the Black Rock Desert north of Reno that achieved success on the last day of the 106th Congress.[60]

Finally, President Clinton's designation of several new national monuments in the year 2000 have not been accompanied by the kind of intense local opposition that marked the creation of Grand Staircase-Escalante in 1996. This is at least partially the result of Secretary Babbitt's

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56. *See* Pub. L. No. 106-399, 114 Stat. 1655 (2000).

57. *See* Colorado Canyons National Conservation Area and Black Ridge Canyons Wilderness Act of 2000, Pub. L. No. 106-353, 114 Stat. 1374; Pub. L. No. 106-530, 114 Stat. 2527 (2000) (Great Sand Dunes National Park).

58. *See* Santa Rosa and San Jacinto Mountains National Monument Act of 2001, Pub. L. No. 106-351, 114 Stat. 1362.

59. *See* Pub. L. No. 106-538, 114 Stat. 2563 (2000).

60. *See* Pub. L. No. 106-554, § 125, 114 Stat. 2763 (2000).

strenuous efforts to consult with affected local interests well before making recommendations to the President.

CONCLUSION

Visionary executive leadership deserves the lion's share of credit for the fact that many of the wonders of the American West today remain in public ownership and are managed to protect their remarkable natural values, in a system of land conservation that is justly famous around the world. This tradition of executive leadership should be celebrated, and work should continue to restore the bipartisan tradition that has characterized most of our history on these issues. After all, these lands and these protections improve the quality of life for all of us, Republican and Democrat alike.

About a century ago, as Teddy Roosevelt was busily coloring in conservation areas on the map of the United States, his lieutenant Gifford Pinchot saw the issue clearly:

> This nation has, on the continent of North America three and a half million square miles. What shall we do with it? How can we make ourselves and our children happiest, most vigorous and efficient, and our civilization the highest and most influential, as we use that splendid heritage? . . . Above all, let us have clearly in mind the great and fundamental fact that this nation will not end in the year 1950, or a hundred years after that, or five hundred years after that; that we are just beginning a national history the end of which we cannot see, since we are still young. . . . On the way in which we decide to handle this great possession which has been given us . . . hangs the welfare of those who are to come after us. . . . As we accept or ignore our responsibility, as trustees of the nation's welfare, our children, and our children's children, for uncounted generations, will call us blessed, or will lay their suffering at our doors.[61]

Wallace Stegner more recently put the same idea a little less apocalyptically:

> We need to remind ourselves constantly that the land resource itself is what must be saved; that like liberty,

61. Farmer's Bulletin #327, *reprinted in* JOHN ISE, THE UNITED STATES FOREST POLICY 377 (1924).

> democracy, all the freedoms guaranteed by the Constitution, like everything we truly value to the point where we might die for it, the heritage of our public lands is not a fact but a responsibility, an obligation, a task. A pleasure.[62]

62. Wallace Stegner, *Our Common Domain*, SIERRA, Sept.–Oct. 1989, at 46.